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NG CHIN TAI (TRADING UNDER THE NAME AND STYLE OF LEAN SEH FISHERY) & ANOR v. ANANDA KUMAR KRISHNAN

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
B PRASAD SANDOSHAM ABRAHAM JCA
HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: P-02(W)-1576-09-2015]
2 FEBRUARY 2018

C ***CONTRACT:*** *Formation – Letter – Brokerage contract – Letter confirming consultancy fees – Whether letter was commercial document in form of agreement – Whether parties aware of contents of letter – Whether letter constituted binding contract – Whether contract valid*

D ***COMPANY LAW****: Lifting of corporate veil – Mala fide actions – Whether company set up as engine of fraud – Whether blatant attempt to avoid obligation under contract established – Whether proper case to lift corporate veil*

The respondent had sued the appellants under a brokerage contract for services rendered in securing supply of seafood on behalf of the appellants
E to Tesco Stores (M) Sdn Bhd ('Tesco'). The respondent's case was that he was approached by DW7, the son of the first appellant, to secure the contract in return of a consultancy fees of 5% of the total sales to Tesco. Subsequently, the respondent obtained a confirmation from the first appellant regarding his consultancy fees of 5% as evidenced in a letter dated 6 February 2005. Of
F crucial importance was the appointment of DW7 by the first appellant to be the person having authority to sign the letter of appointment of the respondent on his behalf. The second appellant, from the respondent's point of view, was set up as a sham to defraud the respondent to avoid the payment of the 5% consultancy fees. On the other hand, the first appellant had completely denied having seen the letter dated 6 February 2005 or having
G appointed DW7 to sign such letter, whilst DW7 testified that he did not understand English and hence, did not understand the contents of the letter. The trial judge, *inter alia*: (i) found the letter dated 6 February 2005 created a binding contract between the respondent and the first appellant; (ii) rejected the first appellant and DW7's evidence; (iii) rejected the plea of illegality that
H the 5% payment was a tax evasion exercise as there was nothing to indicate in the letter that it was a so-called under-counter payment of 3% to one Simon Ng ('DW5'); and (iv) found the second appellant was a facade for the first appellant to evade liability as it was incorporated some three months after the commencement of the suit. The appellants raised the following
I issues for consideration: (i) whether there was a contract between the first

appellant and the respondent; (ii) whether the contract was valid; (iii) whether the contract had been terminated; (iv) whether the respondent was entitled to the payment of RM19 million; and (v) whether the court was entitled to lift the corporate veil.

Held (dismissing appeal with costs)
Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) There was no allegation that the letter dated 6 February 2005 was a fabrication or that DW7's signature on the letter was a forgery. The letter was a commercial document in a form of an agreement made between two parties well-versed with the intricacies of the business world. There was no evidence that DW7 was a naive business person in that he had no idea of the significance of a written document which had set out the business relationship between the respondent and the parties which DW7 represented. In fact, the trial judge had remarked that DW7 could read and understand the English language, thus, negating DW7's only evidence. DW7's evidence relating as to how the 5% was to be shared with DW5 confirmed the existence and genuineness of the 5% fees in the letter. Further, the first appellant had confirmed that DW7 was his representative when dealing with Tesco. Issue (i) was therefore answered in the affirmative. (paras 23-27 & 30)

(2) Mere allegation of 'under-counter' payment in respect of the 5% fees to various persons could not amount to evidence. DW5 who was supposed to receive 3% of the 5% commission had denied that he had asked for the under-counter payment. Hence, issue (ii) was answered in the affirmative. (para 31)

(3) Pertaining to the third and fourth issues, the contract between the respondent and the first appellant had been terminated on 25 October 2015 when Tesco and the second appellant had mutually terminated their relationship. The respondent's entitlement was simply 5% of the total sale to Tesco by the first appellant. Therefore, as there was no longer any relationship between the first appellant and Tesco, there was no more entitlement by the respondent. Further, there was no appeal against the quantum awarded by the trial judge. (paras 32 & 33)

(4) The court has the power to lift the corporate veil of any corporation if it has been established that there are elements of fraud in the conduct of the parties. The trial judge had made correct findings of fact that the second appellant was set up as an engine of fraud to undermine the respondent's contractual rights. Hence, this was a proper case to lift the corporate veil as there a was blatant attempt by the first appellant to avoid his obligation to the respondent. (para 34)

Bahasa Malaysia *Headnotes*

Responden dalam kes ini menyaman perayu-perayu bawah kontrak pembrokeran bagi perkhidmatan yang diberi untuk memperoleh bekalan makanan laut bagi pihak perayu-perayu ke Tesco Stores (M) Sdn Bhd ('Tesco'). Kes responden adalah bahawa dia bertemu dengan DW7, anak lelaki perayu pertama, untuk memperoleh kontrak bekalan tersebut bagi balasan bayaran perunding sebanyak 5% jualan keseluruhan kepada Tesco. Kemudian responden memperoleh pengesahan daripada perayu pertama berkaitan dengan fi perunding sebanyak 5% seperti yang dibuktikan dalam surat bertarikh 6 Februari 2005. Bahagian penting adalah pelantikan DW7 oleh perayu pertama sebagai orang yang mempunyai kuasa menandatangani surat pelantikan responden bagi pihaknya. Perayu kedua, pada pandangan responden, ditubuhkan sebagai penipuan untuk menipu responden bagi mengelak bayaran fi perunding 5%. Sebaliknya, perayu pertama menafikan sama sekali bahawa dia ada melihat surat bertarikh 6 Februari 2005 atau telah melantik DW7 untuk menandatangani surat sedemikian, manakala DW7 memberi keterangan bahawa dia tidak faham Bahasa Inggeris dan oleh itu, tidak memahami kandungan surat tersebut. Hakim bicara, antara lain: (i) mendapati surat bertarikh 6 Februari 2005 membentuk kontrak mengikat antara responden dan perayu pertama; (ii) menolak keterangan perayu pertama dan DW7; (iii) menolak pli ketaksahan bahawa bayaran 5% adalah untuk mengelak cukai kerana tiada apa-apa dalam surat itu yang menunjukkan bahawa ini kononnya bayaran bawah meja 3% kepada seorang yang bernama Simon Ng ('DW5'); dan (iv) mendapati perayu kedua adalah secara zahirnya untuk perayu pertama mengelak tanggungan kerana ditubuhkan kira-kira tiga bulan selepas guaman dimulakan. Perayu-perayu di sini membangkitkan isu-isu berikut untuk pertimbangan: (i) sama ada wujud kontrak antara perayu pertama dan responden; (ii) sama ada kontrak tersebut sah; (iii) sama ada kontrak itu telah dibatalkan; (iv) sama ada responden berhak mendapat bayaran RM19 juta; dan (v) sama ada mahkamah berhak menyingkap tirai penubuhan.

Diputuskan (menolak rayuan dengan kos)
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

(1) Tiada pernyataan bahawa surat bertarikh 6 Februari 2005 adalah rekaan atau tandatangan DW7 atas surat itu dipalsukan. Surat itu adalah dokumen komersial dalam bentuk perjanjian antara dua pihak yang amat memahami selok-belok bidang perniagaan. Tiada keterangan bahawa DW7 adalah ahli perniagaan yang naif dan tidak tahu langsung kepentingan dokumen bertulis yang telah membentuk hubungan perniagaan antara responden dan pihak-pihak yang diwakili DW7.

Hakikatnya, hakim bicara telah menyatakan bahawa DW7 boleh membaca dan faham Bahasa Inggeris, dengan itu, mendalihkan satu-satunya keterangan DW7. Keterangan DW7 berkaitan bagaimana 5% tersebut akan dikongsi dengan DW5 mengesahkan kewujudan dan ketulenan fi 5% dalam surat itu. Selanjutnya, perayu pertama telah mengesahkan bahawa DW7 adalah wakilnya apabila berurusan dengan Tesco. Isu (i) oleh itu dijawab secara afirmatif.

(2) Dakwaan bayaran 'bawah meja' semata-mata berkaitan fi 5% kepada beberapa orang tidak membentuk keterangan. DW5 yang sepatutnya menerima 3% daripada 5% komisyen menafikan bahawa dia meminta bayaran bawah meja. Oleh itu, isu (ii) dijawab secara afirmatif.

(3) Berkaitan isu ketiga dan keempat, kontrak antara responden dan perayu pertama telah ditamatkan pada 25 Oktober 2015 apabila Tesco dan perayu kedua bersama-sama menamatkan hubungan mereka. Hak responden hanya 5% jumlah keseluruhan jualan kepada Tesco oleh perayu pertama. Dengan itu, disebabkan tiada lagi hubungan antara perayu pertama dan Tesco, tiada lanjutan hak responden. Selanjutnya, tiada rayuan dibuat terhadap kuantum yang diawardkan oleh hakim bicara.

(4) Mahkamah mempunyai kuasa menyingkap tirai penubuhan mana-mana pertubuhan jika terbukti wujud unsur-unsur penipuan dalam tindakan pihak-pihak. Hakim bicara telah membuat dapatan fakta yang betul bahawa perayu kedua dibentuk sebagai satu jentera penipuan untuk menjejaskan hak kontrak responden. Oleh itu, ini adalah kes yang mana tirai penubuhan wajar disingkap kerana terdapat cubaan jelas oleh perayu pertama untuk mengelak kewajipannya terhadap responden.

Case(s) referred to:

Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors [2000] 4 CLJ 324 CA ***(refd)***

For the appellants - Ram Karpal Singh, On Yvonne How, Sangeet Kaur Deo & Harshaan; M/s Yew Huoi, How & Assocs

For the respondent - AG Kalidas & Doris Meyappan; M/s K Nadarajah & Partners

[Editor's note: For the High Court judgment, please see Ananda Kumar Krishnan v. Ng Chin Tai (Trading In The Name And Style Of Lean Seh Fishery) & Anor; Tesco Stores (Malaysia) Sdn Bhd (Garnishee) [2017] 5 CLJ 364 (affirmed).]

Reported by S Barathi

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JUDGMENT

David Wong Dak Wah JCA:

Introduction

B **[1]** This is an appeal by the appellants/defendants against the decision of the High Court in which the learned judge sustained the respondent/plaintiff's claim for RM19,000,000 for services rendered to the appellants in securing contracts of supply of fishes to Tesco which is one of the biggest supermarkets in this country.

C **[2]** We heard the appeal and after giving due consideration to the evidence adduced in the trial court and submissions by respective counsel, we dismissed the appeal. We now give our grounds for that decision.

Background Facts

D **[3]** The factual matrix had been set out in detail by the learned judge. However, for this appeal, we shall set out the salient facts. The respondent had sued the appellants under a brokerage contract for services rendered in securing the supply of seafood on behalf of the appellants to Tesco Stores (M) Sdn Bhd (Tesco). As to how this arrangement eventuated, there was not much of a common ground in that both had their version of events which were in E stark contrast.

Respondent's Case

[4] The respondent's version of events was this. Sometime in early February 2004, the respondent met up with one Ng Tee Keat (DW7) who F is the son of the first appellant. DW7 had sought the help of the respondent to secure a contract of supply of seafood with Tesco in return of consultancy fees of 5% of the total sales to Tesco.

[5] Pursuant to that request, the respondent met up with one Miss Patricia of Tesco and gave her quotations from the first appellant for the supply of G seafood. Those quotations were not accepted by Tesco. However, in December 2004, the respondent came to be aware that Tesco was still looking for supply of seafood and contacted DW7 to enquire whether the first appellant was still interested. DW7 confirmed in the affirmative and upon which the respondent contacted one Lee Yan Seng (PW3) who was then the marketing manager of Tesco. PW3 then introduced the respondent and H DW7 to one Ng Shek Chan (DW5) who was the manager of the Fresh and Frozen Food Department of Tesco. DW5 after several meetings requested certain information on the first appellant which was then supplied.

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[6] The respondent then sought confirmation from the first appellant regarding his consultancy fees of 5% of the total sales of seafood to Tesco. This resulted in a letter dated 6 February 2005 signed by DW7 on behalf of the first appellant. A copy of that letter is produced herein:

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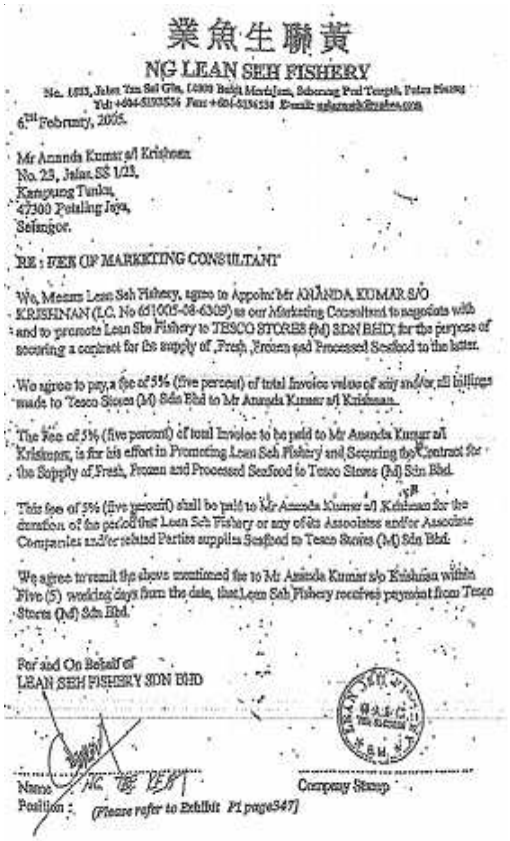

業魚生聯黃

NG LEAN SEH FISHERY

No. 1811, Jalan Tan Sri Gita, 14300 Bukit Mertajam, Seberang Prai Tengah, Pulau Pinang
Tel: +604-5393536 Fax: +604-5396138 Email: ngleansh@tm.net.my

6th February, 2005.

Mr Ananda Kumar a/l Krishnan
No. 23, Jalan SS 1/23,
Kampung Tunku,
47300 Petaling Jaya,
Selangor.

RE : FEE OF MARKETING CONSULTANT

We, Messrs Lean Seh Fishery, agree to Appoint Mr ANANDA KUMAR S/O KRISHNAN (I.C. No 651005-08-6305) as our Marketing Consultant to negotiate with and to promote Lean Seh Fishery to TESCO STORES (M) SDN BHD, for the purpose of securing a contract for the supply of ,Fresh ,Frozen and Processed Seafood to the latter.

We agree to pay a fee of 5% (five percent) of total invoice value of any and/or all billings made to Tesco Stores (M) Sdn Bhd to Mr Ananda Kumar a/l Krishnan.

The Fee of 5% (five percent) of total Invoice to be paid to Mr Ananda Kumar a/l Krishnan, is for his effort in Promoting Lean Seh Fishery and Securing the Contract for the Supply of Fresh, Frozen and Processed Seafood to Tesco Stores (M) Sdn Bhd.

This fee of 5% (five percent) shall be paid to Mr Ananda Kumar a/l Krishnan for the duration of the period that Lean Seh Fishery or any of its Associates and/or Associate Companies and/or related Parties supplies Seafood to Tesco Stores (M) Sdn Bhd.

We agree to remit the above mentioned fee to Mr Ananda Kumar s/o Krishnan within Five (5) working days from the date, that Lean Seh Fishery receives payment from Tesco Stores (M) Sdn Bhd.

For and On Behalf of
LEAN SEH FISHERY SDN BHD

Name : HC TEE BEE
Position : (Please refer to Exhibit P1 page347)

Company Stamp

[7] The circumstance in which the letter was obtained was pursuant to a telephone conference between the respondent and first appellant in the presence of Ng Tee Huat (DW3), who is also a son of the first appellant, DW7 and the plaintiff's manager, Vasantha Kumari a/p K Erusan @ Krishnan (PW5). The telephone conference emanated from DW7 who made the telephone call from the office of the respondent. Of crucial importance was the appointment by the first appellant of DW7 to be the person having his authority to sign the letter of appointment of the respondent on his behalf.

[8] The respondent's cause of action against the first appellant was simply premised on the letter dated 6 February 2005. As for the second appellant, it was set up from the respondent's point of view as a sham to defraud the respondent to avoid the payment of the 5% consultancy fees.

Appellants' Case

[9] From the first appellant's standpoint, it was a complete denial by him in that he had never seen the letter dated 6 February 2005 and had never appointed DW7 to sign such a letter.

[10] As for DW7, his evidence was such that he had never approached the respondent in regard to the supply of fish to Tesco. DW7 and the respondent were only in partnership and had set up a company known as Esteem Farm Sdn Bhd on 19 May 2003 to rear fish.

[11] What had happened was that the respondent had suggested to DW7 to use the supply of fish by the first appellant to Tesco as a way of generating income for Esteem Farm Sdn Bhd. Pursuant to that suggestion, several meetings were held between one Lee Yan Sang (PW3) from Tesco and other relevant personalities. This eventuated in a supply of fish arrangement between Tesco and the first appellant starting from April 2005 until the middle of 2006.

[12] DW7 denied having been involved in the telephone conference with the first appellant at the office of the respondent. As for the letter dated 6 February 2005, DW7 had signed it for the tax purposes and was drafted by the respondent. DW7 further testified that he did not understand English and hence did not understand the contents of the aforesaid letter.

[13] As for the alleged 5% consultancy fees due to the respondent, there was no such arrangement. He was informed by the respondent and PW3 that 3% of the sale price of the fish supply to Tesco was meant to be for one Simon Ng (DW5) with 2% to be paid to Esteem Farm Sdn Bhd.

[14] As for the status of the second appellant, it was an independent entity to the first appellant according to Ng Tee Huat (DW3), another son of the first appellant. As far as the DW3 was concerned, the first appellant was involved with wholesale business to local fishmongers while the second appellant conducts fish trading to established companies. It was denied that the second appellant was set up to avoid the first appellant's obligation under the letter dated 6 February 2005.

[15] Premised on the above, the first appellant had counterclaimed against the respondent for the return of the 5% of the total sale price of seafood to Tesco which had been paid to the respondent from 1 January 2005 to 24 December 2005 in the sum of RM421,706.32, a sum of RM23,000 being excess payment of transportation costs and general damages.

High Court Decision

[16] The learned judge in substance found that the version of events of the respondent to be more credible to that of the version of the appellants. Having made that decision, the learned judge found that the letter dated 6 February 2005 had created a binding contract between the respondent and the first appellant.

[17] The letter dated 6 February 2005 was a product of the telephone conference between the respondent and first appellant and witnessed by DW7, DW3 and PW5. It was the contention of the appellants that no such telephone conversation had taken place.

[18] Both the first appellant and DW7 flatly denied such conversation while DW3 testified that at the material time, he was in Dubai and tendered his passport as proof of his assertion. The learned judge found as a fact that DW3's contention was not proven as it had been neutralised by the evidence of PW7 who was an immigration officer and had testified that the records from the Immigration Department did not show that DW3 was in fact out of the country between 22 October 2004 to 2 April 2005. Further, the exit endorsement of the United Arab Emirates on DW3's passport was suspicious as the samples of the United Arab Emirates immigration's exit endorsement was different to that shown in the DW3's passport.

[19] The learned judge also rejected the flat denial of the first appellant and DW7.

[20] As for the plea of illegality of the 5% payment as a tax evasion exercise, the learned judge rejected the same for the simple reason that on the face of the letter dated 6 February 2005, there was nothing to indicate the allegation that it was a so-called under counter payment of 3% to one Simon Ng (DW5).

[21] In regard to the status of the second appellant as façade for the first appellant to evade its liability under the letter dated 6 February 2005, the learned judge found that as a fact premised on the second appellant's incorporation was effected some three months after the commencement of this suit and the admission of DW3 that the second appellant was formed for the purpose of supplying fish products to Tesco.

Our Grounds Of Decision

[22] Before us, learned counsel for the appellant had correctly listed five issues for our consideration and they were as follows:

1. Whether there is a contract between the 1st Appellant and the Respondent ('The privity issue') [Memorandum of Appeal: Grounds 1 – 7];
2. If there is a contract between the 1st Appellant and the Respondent, whether the contract is valid ('The illegality issue') [Memorandum of Appeal: No. 2, 8 – 9];
3. If the contract is valid, whether the contract has been terminated ('The perpetuity issue') [Memorandum of Appeal: No. 10 – 14];
4. If the contract has not been terminated, whether the Respondent is entitled to payment of RM19million ('The effective cause issue') [Memorandum of Appeal: No. 15]; and
5. Whether the Court was entitled to lift the corporate veil of between the Appellants ('The corporate veil issue') [Memorandum of Appeal: No. 16-22].

[23] In our deliberation, we started with the letter dated 6 February 2005 as this was the only documentary evidence before the trial court and most importantly there is no allegation that the letter was a fabrication or that DW7's signature on the letter was a forgery. The case of the respondent, so to speak, was on the front foot from the start of the case and hence incumbent on the appellants to neutralise it. The question then was whether the appellants had done so such that the letter dated 6 February 2005 had been rendered a useless piece of evidence. It is trite law or for use of a better phrase common sense that in adjudicating or resolving any dispute of facts that where there was a written document, any oral evidence to the contrary must be treated with some suspicion.

[24] In the context of this case, the letter dated 6 February 2005 was a commercial document in a form of an agreement made between two parties well versed with the intricacy of the business world. There was no evidence that DW7 is a naive business person in that he had no idea of the significance of a written document which had set out the business relationship between the respondent and the parties which DW7 represented. The only evidence

of DW7 was that he did not understand English and was not aware of the meaning of the contents of the letter. Even taking that evidence to its highest, it did not explain the fact that why DW7, being someone who is a businessman and represented his father, the first appellant did not see fit to seek advice, legal or otherwise before he signed that document. In any event, the learned judge had remarked in his ground that from his observation of DW7 in court, DW7 can read and understand the English language.

[25] DW7's evidence relating as to how the 5% amount was to be shared with DW5 in our view confirmed that the existence of the 5% fees in the letter dated 6 February 2005 was not a figment of anyone's imagination. It thus also confirmed the existence and genuineness of the same.

[26] As for the evidence of DW3 in regard to him being out of the country during the material time of the signing of the letter dated 6 February 2005, the learned judge had made a finding of fact which we were not willing to disturb as it was made premised on established evidence.

[27] The aforesaid evidence hence made by the allegation of the first appellant that he knew nothing about the letter dated 6 February 2005 was bereft of any substance. Actually, the first appellant had in his testimony confirmed that DW7 was his representative when dealing with Tesco. This was his evidence:

> AGK: I put to you that Ng Tee Keat is your representative. Sorry my Lord, I put to you that Ng Tee Keat is your agent and representative of the first Defendant in all matters relating to Tesco.
>
> NCT: Saya Setuju, Yang Arif.
>
> AGK: I put to you that you also gave the authority to Ng Tee Keat to deal with Tesco on behalf of the first Defendant.
>
> NCT: Ya, Yang Arif.

[28] Further, in coming to our view on the status of the letter dated 6 February 2005, we applied certain established trite principles of law. The first of which is that an appellate court will always be slow in disturbing any finding of facts by the trial court for the obvious reason that the trial court had the advantage and benefit of seeing and observing the mannerism in which evidence was offered by the relevant witnesses. This benefit should never be underestimated by the appellate court. The only time in which an appellate court should intervene is when the trial court had not subjected the totality of evidence to judicial appreciation and had reached a decision which was perverse or devoid of any reasons or plainly wrong. This was not the case here as the learned judge had studiously evaluated the totality of the evidence before reaching a well-reasoned decision supported by established evidence.

[29] Another principle of law is what was stated by this court in *Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors* [2000] 4 CLJ 324 at p. 330:

> In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also incumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact.
>
> ...
>
> We say that this evaluation exercise is most crucial for it must be remembered that the respondents were testifying to events that happened eighteen years ago whilst the contemporaneous documents speak of matters then existing at the time such documents, were issued.

[30] Premised on the above, we answer issue 1 as set out by learned counsel for the appellant in the affirmative. We now move to issue 2.

[31] We agree with the manner in which the learned judge had dealt with the illegality plea. Mere allegations of "under counter" payment in respect of the 5% fees to various persons cannot amount to evidence. As pointed by the learned judge, DW5 who was supposed to receive 3% of the 5% commission had denied that he had asked for the under-counter payment. Accordingly, we answered issue 2 in the affirmative.

[32] As for issue 3 and 4 relating to the perpetual nature of the contract between the respondent and first appellant, we agreed with learned counsel for the respondent that the contract had been terminated on 25 October 2015 when Tesco and the second defendant had mutually terminated their relationship. The respondent's entitlement was simply 5% of the total sale to Tesco by the first appellant. If there were no more relationship between the first appellant and Tesco, there was no more entitlement by the respondent. That we said was the long and short of the contents of the letter dated 6 February 2005.

[33] As for the amount awarded by the learned judge, firstly as pointed by counsel for the respondent, there was no appeal as to the quantum of the award by the trial court. Secondly, we thought that was perfectly correct as the evidence of PW2 being the financial controller of Tesco and in our view, an independent witness was not challenged seriously and for good reason.

[34] In regard to issue 5, we fully agreed with the learned judge's finding that this was a proper case to lift the corporate veil as there was a blatant attempt by the first appellant to avoid its obligation to the respondent. The law is crystal clear. The court has the power to lift the corporate veil of any corporation if it had been established that there are elements of fraud in the

conducts of parties. Here the learned judge, in our view, had made correct findings of fact that the second appellant was set up as an engine of fraud to undermine the respondent's contractual rights.

Conclusion

[35] For reasons stated above, the appeal was dismissed with costs in the sum of RM20,000 subject to allocator fees. We also ordered that the deposit be refunded to the appellant.